

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DUNN & BLACK, P.S.,

Plaintiff,

-vs-

THE UNITED STATES OF AMERICA; and  
ENVIRONMENTAL RECLAMATION, INC., an  
Idaho corporation; and JOHN DOE  
CORPORATIONS 1-10,

Defendants.

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FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND, a Maryland corporation,  
and AMERICAN GUARANTY & LIABILITY  
INSURANCE COMPANY, a New York  
corporation,

Intervenors.

NO. CV-04-0229-LRS

ORDER DENYING MOTION FOR  
RECONSIDERATION

BEFORE THE COURT is Intervenors' Fidelity and Deposit Company of Maryland and American Guaranty & Liability Insurance Company's [Intervenors] Motion for Reconsideration, filed March 11, 2005 (Ct. Rec. 79), without oral argument. Defendant United States responded to Intervenors' motion for reconsideration (Ct. Rec. 81) on March 18, 2005. Intervenors ask the court to reconsider its order of February 25, 2005, denying Intervenors' Motion for Declaratory Judgment (Ct. Rec. 78).

**DISCUSSION**

Motions for reconsideration serve a limited function. Under the Federal Rules of Civil Procedure, motions for reconsideration may be made

1 pursuant to Rule 59(e). The major grounds for granting a motion to  
2 reconsider a judgment are: (1) intervening change of controlling law; (2)  
3 availability of new evidence; and (3) the need to correct clear error or  
4 prevent manifest injustice. *School District No. 1J, Multnomah County*  
5 *Oregon v. Acands, Inc.*, 5 F.3d 1255, 1263 (9<sup>th</sup> Cir.1993). A motion for  
6 reconsideration is not appropriately brought to present arguments already  
7 considered by the court. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9<sup>th</sup>  
8 Cir.1985). Plaintiff does not argue that there has been a change of  
9 controlling law, or that new evidence is available, but expressly argues  
10 that the Court committed error of law or fact and reconsideration is  
11 necessary to prevent a manifest injustice. Ct. Rec. 79, page 2.

12 Intervenor state that even if the setoff claim of the United States  
13 has priority over the Plaintiff's attorney fee lien claim, case authority  
14 and relevant statutes do not support the conclusion that the United  
15 States' setoff claim should have priority over Intervenor's claim. *Id.*  
16 More particularly, Intervenor argue that because "[t]he United States  
17 should be treated no differently than any other similarly situated  
18 creditor, the United States should have no right to setoff the tax claims  
19 that accrued after the ERI claims had already been assigned to  
20 Intervenor under well established common law principles." *Id.*

21 Intervenor assert that once Intervenor completed their performance  
22 under the surety bonds, the claims were assigned to them by the operation  
23 of law and pursuant to the Indemnity Agreement and the Article 9 security  
24 agreement thereby destroying "mutuality." Intervenor argue that they  
25 fully performed their obligations under the surety bonds prior to the  
26 date that the tax claim against ERI accrued, which provides the basis for

1 Intervenor's claim to the judgment fund of \$450,000. Performance,  
2 Intervenor state, results in Intervenor being equitably subrogated to  
3 ERI's claims against the United States, which are represented by the  
4 judgment fund. Equitable subrogation causes an assignment by operation  
5 of law, effectuating the transfer of collateral, including the interest  
6 in the causes of action that resulted in the judgment fund in this case,  
7 for which no formal assignment or transfer is necessary. From that point  
8 forward, Intervenor reason, they were the real parties in interest, not  
9 ERI, which became merely a nominal party. In summary, Intervenor state  
10 that the United States cannot setoff against a claim that was assigned  
11 before the claim for setoff accrued.

12 Intervenor argue that the court concluded the United States should  
13 have priority over Plaintiff's attorney fee lien claim and Intervenor's  
14 interests based on the application of common law setoff principles. Ct.  
15 Rec. 79, at 7-8. To clarify, this court ruled, following analysis of the  
16 federal lien priority statute and common law, that the United States  
17 prevailed under statutory setoff (31 U.S.C. §3728) alone, not common law  
18 setoff. Likewise, Intervenor rely on case law that was decided over  
19 twenty years before the current version of §3728 was enacted, which case  
20 law discusses common law setoff, not statutory setoff. Ct. Rec. 85, at  
21 4 (citing *The Home Indemnity Company v. United States*, 313 F.Supp. 212  
22 (W.D.Mo. 1970)).

23 Finally, Intervenor acknowledge that the lawsuit that resulted in the  
24 creation of the judgment fund was between ERI and the United States.  
25 Intervenor state that the lawsuit was filed without their knowledge.

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1 Intervenorors argue that ERI only had a right to act in the capacity of a  
2 "constructive trustee" on behalf of Intervenorors. The court disagrees.

3 This case involves a judgment that ERI, not Intervenorors, obtained  
4 against the government through litigation of ERI's claimed damages  
5 suffered as a result of the government's alleged wrongful termination.  
6 The funds for these damages are not funds that the government would apply  
7 towards the cost of completing the job, but rather funds the government  
8 would pay to ERI in settlement of its claim for damages against the  
9 government for wrongful termination on the Warren Gap Project.

10 Intervenorors did not or perhaps could not intervene in the Court of  
11 Claims lawsuit and as such are bound by the judgment entered therein.  
12 ERI was the only party suing the United States and the only recipient of  
13 the court's award. Under the facts of this case, the court does not find  
14 convincing Intervenorors' assignment under state law theory nor the lack  
15 of mutuality theory raised in this motion. Accordingly,

16 **IT IS ORDERED** that Intervenorors' Motion for Reconsideration, filed  
17 March 11, 2005, **Ct. Rec. 79**, is **DENIED**.

18 The District Court Executive is directed to file this ORDER and  
19 provide copies to counsel.

20 **DATED** this 18<sup>th</sup> day of April, 2005.

21 *s/Lonny R. Suko*

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23 LONNY R. SUKO  
24 UNITED STATES DISTRICT JUDGE  
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